

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D29384
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_____AD3d_____

Submitted - November 15, 2010

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
PLUMMER E. LOTT
SHERI S. ROMAN, JJ.

2009-09932

DECISION & ORDER

The People, etc., respondent,
v Joseph Caraballo, appellant.

(Ind. No. 1853/05)

Lynn W. L. Fahey, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Morgan J. Dennehy of counsel; Diana Bracho on the brief), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (DiMango, J., at plea; D’Emic, J., at sentence), rendered October 20, 2009, convicting him of burglary in the second degree and petit larceny, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is modified, on the law, by vacating the sentence imposed; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for resentencing.

As correctly conceded by the People, the defendant was improperly sentenced as a second violent felony offender. In *People v Dickerson* (85 NY2d 870, 871-872), the Court of Appeals determined that a plea of guilty to attempted criminal possession of a weapon in the third degree, when charged in “the top count” of a superior court information, did not constitute a violent felony pursuant to Penal Law § 70.02(1)(d). Under Penal Law § 70.02(1)(d), the crime of attempted criminal possession of a weapon in the third degree constitutes a class E violent felony offense only when the defendant is convicted of such charge as “a lesser included offense . . . as defined in section 220.20 of the criminal procedure law.” CPL 220.20(1) defines a “lesser included offense” as one where the defendant pleads “to an offense of lesser grade than one charged in a count of an

indictment.” “Thus, according to the plain statutory language, a class E violent felony offense is reserved for accuseds who plead guilty to attempted criminal possession of a weapon in the third degree as a lesser included offense under an indictment charging a greater offense” (*People v Dickerson*, 85 NY2d at 872).

In 2000, the defendant pleaded guilty to attempted criminal possession of a weapon in the third degree as the sole count of a superior court information. Therefore, the defendant’s conviction of that crime, upon his plea of guilty, did not constitute a violent felony pursuant to Penal Law § 70.02(1)(d). Consequently, the defendant should not have been sentenced as a second violent felony offender (*see People v Dickerson*, 85 NY2d at 872), and the matter must be remitted to the Supreme Court for resentencing (*see People v Banuchi*, 304 AD2d 402, 403; *People v Williams*, 290 AD2d 570, 571).

RIVERA, J.P., DICKERSON, LOTT and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court